No. 13034

In the United States Court of Appeals for the Ninth Circuit

JESSE M. ALLEN, LIBELANT-APPELLANT,

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES AND APPENDIX

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JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. 1291 by reason of a notice of appeal, filed July 2, 1951 (R. 43), from a decree in favor of the United States, entered on June 22, 1051 (R. 39).[1]

The jurisdiction of the District Court purports to be invoked under the Public Vessels Act, 1925 (46 U.S.C. 781-789), by (1) an original libel, filed October 14, 1949, in two counts (SR. 1-6), the *first,* for damages by unseaworthiness on voyages aboard public vessels of the Army Department, beginning July 5, 1945 and ending July 8, 1947, the *second,* for maintenance from and after October 25, 1947, and (2) an amended libel, filed

[1] For the convenience of the Court we have printed in the Appendix to this brief the most important parts of the record. Throughout this brief the abbreviations R, for apostles or record; SR, for supplemental apostles or record, and Appx., for the Appendix, are employed. The figures following refer to the respective pages.

November 8, 1949, in three counts (R. 2-9, Appx. 1a-6a), which added to the foregoing a *third,* for breach, on October 9, 1947, of a written contract of employment.

QUESTIONS

Libelant, a civil service employee of the United States, contracted tuberculosis during his service on certain vessels of the Army Transport Service. His last voyage ended July 8, 1947, he returned to the continental United States, and the Government thereafter terminated his employment on October 9, 1947. He filed timely claim for compensation under the Federal Employees' Compensation Act and later, on October 14, 1949, brought suit under the Public Vessels and Suits in Admiralty Acts for damages by unseaworthiness, for maintenance and for breach of his special written contract of employment. Subsequently, an award of compensation was made to him which he elected to receive in place of all other benefits and he is currently collecting checks therefor. The questions are—

1. Whether libelant's suit is barred by the expiration of the two year statute of limitations of the Public Vessels and Suits in Admiralty Acts.

2. Whether, in the absence of an explicit statutory direction for double recovery or election, the injury, illness or death in the performance of duty of civil, unlike military service employees of the United States, gives rise to a right of action against the Government, or whether their sole recovery is the benefits of the compensation, leave, and retirement statutes applicable to personnel of their type.

3. Whether under the special written employment contract in this case appellant was entitled to payment of full wages after termination of the voyage until his complete recovery.

4. Whether appellant's irrevocable election, pursuant to the Act of July 1, 1944, of benefits under the

Federal Employees Compensation Act, rather than any payments or benefits otherwise available because of his service as a government employee, is binding or may be set aside on the ground of economic coercion.

STATUTES

1. The Federal Employees' Compensation Act, 1916, c. 458, 39 Stat. 742, as originally enacted and as in effect at all times here involved provided in pertinent part:

> [Sec. 1.] That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty * * *
>
> Sec. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States.

2. The Act of July 1, 1944, c. 373, 58 Stat. 712, amending Section 7 of the original Compensation Act so as to require election between compensation benefits and any payments or benefits otherwise available because of service as a government employee, at all times here involved, provided:

> Sec. 605. (a) Section 7 of the Act of September 7, 1916, entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", as amended (U.S.C., 1940 edition, title 5, sec. 757), is amended by changing the period at the end thereof to a colon and adding

the following: "*Provided,* That whenever any person is entitled to receive any benefits under this Act by reason of his injury, or by reason of the death of an employee, as defined in section 40, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall elect which benefits he shall receive. Such election shall be made within one year after the injury or death, or such further time as the Commission may for good cause allow, and when made shall be irrevocable unless otherwise provided by law."

STATEMENT

Appellant was a civil service employee of the Army serving in the engine department of various Army Transport vessels in various capacities up to the final rating of Chief Engineer. He was employed first under a renewable one-year written employment contract. Later he signed a permanent agreement of enrollment as a civil service employee of the Army Transport Service. His prior original contract was not renewed. He developed tuberculosis in the service of his vessels. On July 8, 1947, he was discharged from his last voyage. Thereafter he was returned to the continental United States and on October 9, 1947, he was terminated and his pay stopped. On July 26, 1948, he filed claim for compensation under the Federal Employees' Compensation Act. On October 14, 1949, he brought his original libel in two counts, (1) for damages by unseaworthiness, and (2) for maintenance money. On November 8, 1949, he filed an amended libel adding an entirely new count (3) for damages for breach of an alleged written contract to pay him full wages after discharge until his complete recovery.

On May 26, 1950, an award of compensation at the rate of $89.71 per week was made appellant by the Compensation Bureau. In view of his pending suit the award was conditioned, as required by the Act of July 1, 1944, c. 373, 58 Stat. 712, upon appellant's election to accept the benefits so awarded in place of the wage payments and other benefits he was claiming in his pending suit. On July 21, 1950, he executed the required election. Thereafter, on August 4, 1950, an initial check for $6,486.87 accrued compensation was issued to him and up until the present checks for $391.12 have continued to issue to him each four weeks. Appellant has continued to cash all such compensation checks as received but did not voluntarily dismiss his libel in accordance with his election. When the court below dismissed his libel, on the ground that his election bared the present action, appellant took this appeal.

In the amended libel (R. 2-9, Appx. 1a-6a) the first count alleged appellant's service on the allegedly unseaworthy vessels to have been during the period from July 5, 1945 to July 8, 1947 (Art. 3, R. 3, Appx. 1a) and the diagnosis of tuberculosis as being made on October 25, 1947 (Art. 6, R. 4, Appx. 2a). The second count, however, alleged appellant to have been under medical treatment ever since August 1947 (Art. 17, R. 6, Appx. 4a). In the second count maintenance money was claimed from January 19, 1948 (Art. 15, R. 6, Appx. 3a). The third count alleged that the United States terminated wage payments to appellant on October 9, 1947 (Art. 21, R. 8, Appx. 5a) but despite the allegation that appellant has been under medical treatment since August 1947 (Art. 17, R. 6, Appx. 4a) asked wages only from October 25, 1947 (Arts. 21-22, R. 8, Appx. 5a).

The United States filed an answer (R. 10-15) and moved for summary judgment (R. 16). As the local admiralty rules made no provision for summary judg-

ment the district court heard the case on the pleadings, admissions and documentary evidence and filed an "Order for Decree" stating as his reason for the dismissal that libelant's acceptance of compensation barred recovery (R. 32, Appx. 7a). The district court also made findings and conclusions (R. 35-38, Appx. 8a-10a) and entered a decree dismissing the amended libel (R. 39).

The findings may be quickly summarized. Appellant had two contracts with the United States: the first entered into on May 27, 1944 was for one year, "thereafter, on March 14, 1945, a new contract was entered into between libelant [appellant] and the United States of America by and through [the] Army Transport Service for [the] duration of the war plus six months" (Fndg. I, R. 35, Appx. 8a). Appellant first served on a voyage on the FS 292, beginning at Los Angeles on July 5, 1945 and ending at Guam on May 26, 1946; next on a voyage on the FS 411, beginning at Guam on May 26, 1946, and ending on July 8, 1947. In the course of this service he was successively promoted so that when the last voyage ended he was Chief Engineer (Fndg. III, R. 36, Appx. 9a). Prior to the institution of this suit, appellant had filed claim under the Federal Employees' Compensation Act for compensation on account of having become ill with tuberculosis during the course of his employment with the United States (Fndg. IV, R. 36, Appx. 9a). Subsequent to filing this suit, appellant accepted payment of compensation under an award by the Compensation Bureau (Fndg. V, R. 36-37, Appx. 9a). This acceptance of compensation was voluntary "without coercion, duress, misrepresentation or undue influence of any nature whatsoever, and with full knowledge and awareness that he was applying for and receiving from respondent [United States] payments on account of compensation for his illness, under the compensation act" (Fndg. VI, R. 37, Appx. 9a).

The court's findings may be supplemented from the documents in evidence. As the court below found, appellant had two distinct employment contracts, the second a new contract entirely superseding the other. The first was dated May 27, 1944, and entitled "Employment Contract" (Libelant's Exhibit 3, Appx. 11a-15a). It provided that appellant would serve for one year (Article 1) subject to extension "upon agreement of both parties in writing" (Article 17, Appx. 14a). There is no document in writing extending the 1944 one-year contract, but instead on March 14, 1945, the parties entered into a new superseding agreement. This was a so-called permanent enrollment agreement providing for employment for the duration of the war plus six months unless sooner relieved on entirely different terms from the 1944 one-year contract (Libelant's Exhibit 4, Appx. 15a-18a). It provided:

> I understand that this constitutes an agreement of enrollment supplemental to my appointment as an employee of the Government under Civil Service Rules, Schedule A-IV-3 thereof, and that I am entitled to pertinent Civil Service rights, privileges and benefits thereunder, including special benefits applicable to marine employees of the War Department as may be pertinent thereto in accord with law and regulations.
>
> * * * * * * * *
>
> I agree * * * if the Government should exercise its right to relieve me prior to the conclusion of this term of enrollment for whatever reason, I may be disenrolled and my employment terminated at the pleasure of the Government and under such circumstances I shall have no further right or claim against the Government whatsoever, except as may be provided by law or regulations now or hereafter to be established.

Under date of May 26, 1950, an award of compensation was made libelant at the rate of $89.71 per week for

the future plus several thousand dollars of accrued compensation. In accordance with the provisions of the Act of July 1, 1944, c. 373, 58 Stat. 712, requiring election by claimants entitled to other payments the award (Respondent's Exhibit A, Appx. 19a-20a) provided:

> That claimant above named, having previously filed a libel in admiralty in the United States District Court, Southern District of California, Central Division, against the United States of America, shall be required to elect whether he intends to pursue his libel filed in the United States District Court or to receive benefits under the Federal Employees' Compensation Act.
>
> * * * * * * * *
>
> That before compensation is paid under this award the claimant shall be required to execute and return the attached election to receive benefits under the Federal Employees' Compensation Act in place of any benefits under any other Act of Congress, including the Public Vessels Act, Suits in Admiralty Act and the Federal Tort Claims Act.

Thereafter, on July 21, 1950, appellant executed the required election agreeing as follows (Respondent's Exhibit A, Appx. 23a):

> I, *Jesse M. Allen,* injured in the performance of duty while employed by *Department of the Army, San Francisco Port of Embarkation, Fort Mason, California,* at *A.P.O. 264 and A.P.O. 455,* on *prior to Aug. 14, 1947,* having filed a claim pursuant to the provisions of the Federal Employees' Compensation Act, as amended (5 U.S.C. 751), on account of such injury elect, in accordance with Section 7 of said Act to receive benefits if available under said Act, in place of any benefits (other than the proceeds of any insurance policy) under any other Act of Congress, including the Public Vessels Act, Suits in Admiralty Act, and the Federal Tort Claims Act.

Appellant has not, however, dismissed his libel as agreed, but while collecting under the award has continued his litigation on the ground that his election and acceptance of compensation was under "economic duress and coercion" (cf. Appellant's Br. 14-16). In support of his claim of coercion appellant's only evidence was his own affidavit stating as follows (Libelant's Exhibit 5, Appx. 27a):

> Jesse M. Allen, being first duly sworn, deposes and says: That he is the libelant in the above entitled action. That he was without funds with which to live upon and support his wife and was forced thereby to take the funds awarded to him under his claim for compensation under the F.E.C.A. for Tuberculosis that he suffered as the result of his employment under the contracts of employment with the United States Army Transport Service. That libelant has been unable to work since he was taken to the hospital suffering from what later was discovered to be Tuberculosis, in the Fall of 1947.

The court below rejected appellant's contention that he might repudiate the irrevocable election required by the Act of July 1, 1944, c. 373, 58 Stat. 712, as a condition precedent to payment. The court found (R. 36-37, Appx. 9a-10a):

> V. That following the execution and filing of said claim for compensation under the Federal Employees' Compensation Act, as aforesaid, libelant received and accepted compensation payments for said illness from the United States Employees' Compensation Commission subsequent to the institution of suit.
>
> VI. That libelant applied for, received and accepted compensation payments voluntarily, without coercion, duress, misrepresentation or undue influence of any nature whatsoever, and with full knowledge and awareness that he was applying for and receiving from respondent [United States]

payments on account of compensation for his illness, under the Compensation Act.

The court accordingly entered its decree dismissing appellant's amended libel and this appeal followed. [2]

SUMMARY OF ARGUMENT

I. Appellant's first and third claims, for damages by unseaworthiness and for breach of an alleged special contract to pay him full wages until complete recovery, are time barred because not brought within the two-year jurisdictional limitation of the Public Vessels and Suits in Admiralty Acts. His claim for unseaworthiness accrued on July 8, 1947, when his service on the vessels ended and he was discharged. Limitations had thus expired before he brought suit on October 14, 1949. His claim for wages was accrued on October 9, 1947, when the Government terminated him and stopped all payment of wages. Limitations had therefore expired long before he first brought suit for this new claim in his amended libel filed November 8, 1949. But even if this new claim were to relate back to the filing of the original libel on October 14, 1949, which we deny, still it was more than two years after his termination on October 9, 1947. It was, therefore, equally time barred. Appellant's second claim, for maintenance, is good as to any accruing within two years of the filing of the libel, but in this court he appears to abandon it on the ground that he has already collected compensation (Appellant's Br. 17).

[2] The court below appears to have agreed with other courts which have passed upon the point that the 1949 amendments did not modify the rights of the civilian component of the crew of armed forces vessels. Nowhere, either in the order for decree or in the findings and conclusions is there the slightest foundation for appellant's assertion (Br. 10) that "The lower court held that such act [of 1949] abrogated the vested interests of libelant in his contract of employment with the United States."

II. Appellant's right to receive compensation precludes his recovery on both his first and second claims, for unseaworthiness and for maintenance money. It is the settled law of four circuits, *Mandel* v. *United States,* (3d Cir., August 16, 1951); *Johansen* v. *United States,* (2d Cir., July 30, 1951); *Lewis* v. *United States,* (D.C. Cir., 1951) 190 F. 2d 22; and *Posey* v. *Tennessee Valley Authority,* (5th Cir., 1937) 93 F. 2d 726, that the rights of government personnel under the particular compensation, leave and retirement statutes applicable to employees of their class are exclusive and preclude the existence of any cause of action against the United States for injury, illness or death. The necessity for this rule where members of the civil service component of the crew of Army Transport vessels are concerned is obvious from a consideration of the nature of such operations.

The attack transports, hospital ships and tugs involved in these cases are auxiliaries of the fleet employed in the very presence of the enemy. Their crews, civil and military service components alike, are equally subject to military law. Since the military service component is confined to their rights under the military compensation, leave and retirement acts, justice requires a similar limitation when the civil service component is involved. This is particularly so since the civil service benefits are more generous. It also accords with the decisions of the Comptroller General, and later of Congress in the War Shipping Administration (Clarification) Act, which exclude government employed merchant seamen from the benefits of compensation and make exclusive their recovery by suit. For the details of our argument on this point we refer to the Government's brief in No. 12906, *Vatuone* v. *United States.*

III. Appellant has no right to wages after his termi-

nation on October 9, 1947. As a seaman, under the general law maritime he had no right to wages after his discharge at the conclusion of his last voyage on July 8, 1947. As a government employee, he had no right to wages after his termination, on October 9, 1947, following his return to the continental United States. His 1945 permanent agreement of enrollment as a civilian marine employee of the Army Transportation Corps provided that the Government, in its discretion, could relieve him of duty at any time, in which event he would be entitled to wages only until his return to the United States. His 1945 permanent enrollment agreement was alone in force at the time of his termination. His original 1944 renewable one-year employment contract had not been renewed and had been superseded by his permanent enrollment agreement of March 14, 1945. This was, of course, long before the beginning, on July 5, 1945, of his first voyage involved in the present litigation. But, even if appellant's 1944 one-year contract was still in some way effective, still that agreement equally allowed full wages during sickness *but only within the one-year contract period, or any written renewal thereof.*

IV. Appellant's election to accept compensation, in place of his disputed claim for full wages until recovery, requires dismissal of his claim for wages. Neither the 1944 nor the 1949 amendments to the original 1916 Federal Employees' Compensation Act altered appellant's rights. Section 7 of the original 1916 Act expressly prohibited the payment of unearned wages for any period for which compensation was paid. Appellant's receipt of compensation thus required dismissal of his claim for wages aside from any amendments after 1916. The 1944 amendment merely added the procedural requirement that before receiving payments of compensation the claimant should file a formal election. It made no change in the substantive

effect of the original statutory prohibition of 1916. The 1949 amendment was merely declaratory of the pre-existing exclusiveness and in any event does not by its terms apply to seamen, such as appellant here. Upon electing, appellant collected accrued compensation of $6,486.87. Since that time he has continued to collect $391.12 each four weeks. Appellant has not offered to return the money, and it is not disputed that appellant acted with full knowledge of the legal prohibition against collecting both compensation and wages. Despite the avuncular indulgence which seamen, including masters and officers, enjoy as members of a privileged class who are wards of the admiralty judges, we submit that Chief Engineer Allen should none the less be bound by the plain Congressional command just as are more humble citizens.

ARGUMENT

I

Appellant's claims for damages by unseaworthiness and by breach of his special employment contract are barred by the two-year jurisdictional limitation of the Public Vessels and Suits in Admiralty Acts.

At the outset appellant's first and third claims, for unseaworthiness and wages, are met by the bar of the two-year jurisdictional statute of limitations of the Suits in Admiralty Act (46 U.S.C. 745), made equally applicable under the Public Vessels Act by reason of 46 U.S.C. 781. *Phalen* v. *United States,* (2d Cir., 1929) 32 F. 2d 687; *Sgambati* v. *United States,* (S.D. N.Y., 1947) 75 F. Supp. 18, aff'd 172 F. 2d 297, cert. den. 337 U.S. 930. As for appellant's second claim, for maintenance money, jurisdiction exists for any maintenance which accrued within two years before October 14, 1949, the filing date for appellant's original libel claiming maintenance. But in this Court appellant abandons any

claim for maintenance [3] while his claims for damages by unseaworthiness and for breach of his employment contract are clearly time barred.

Appellant's first claim, for damages by unseaworthiness, accrued not later than July 8, 1947, the date on which his last voyage terminated (Am. Lib. Art. 4, R. 3, Appx. 2a; Fndg. III, R. 36, Appx. 9a). This was more than two years prior to the filing of the libel on October 14, 1949. Furthermore, appellant's medical treatment admittedly was during August 1947 (Am. Lib. Art. 17, R. 6, Appx. 4a, cf. 24a-27a), which likewise was more than two years before. It cannot help the appellant to allege that a further final diagnosis was made on October 25, 1947, which confirmed that his disease was tuberculosis. (Am. Lib. Art. 7, R. 4, Appx. 2a). Under settled decisions as well as plain logic the cause of action for injury by diseases such as tuberculosis and silicosis accrues the last day on which the claimant was exposed to the conditions causing his injury, not when a precise

[3] Appellant's brief (p. 17) states: "The second cause of action is for maintenance, but the payment of compensation is the same as the payment of maintenance and a recovery of maintenance and the collection of compensation would amount to double recovery." Of course compensation is not in any sense the same as maintenance. Compensation is a very great deal more. Compensation, like maintenance is paid for injury or illness while in the service of the ship regardless of fault or negligence. Unlike maintenance, compensation is payable even though the seaman is hospitalized and receiving full maintenance in kind. Compensation is only limited by a statutory maximum of $525 per month (5 U.S.C. 756(c)) and not, like maintenance, to the reasonable value of the seaman's quarters and subsistence. Since August 1948 the usual rate on maintenance has risen to a maximum of $6.00 per day or $42.00 per week as compared with appellant's weekly compensation in this case of $89.71. Before August 1948, maintenance was still lower, usually only $4.50 per day.

diagnosis was subsequently made.[4] Here that date was July 8, 1947, the day he left the vessel.

Appellant's third claim for the alleged breach of his special employment contract equally, accrued more than two years before he brought suit for the breach, whether this be regarded as dating from its first inclusion in the amended libel of November 8, 1949 or from the original libel of October 14, 1949.[5] The breach, if there was one, clearly occurred and appellant's third cause of action arose on October 9, 1947, when he was terminated (Am. Lib. Art. 21, R. 8, Appx. 21a). There is no question but that appellant's third claim accrued on October 9, 1944, when the United States finally terminated appellant under its interpretation of the contract and

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[4] *Sadowski* v. *Long Island RR Co.,* (1944) 292 N.Y. 448, 55 N.E. 2d 497, 501; *Michalek* v. *U. S. Gypsum Co.,* (2d Cir., 1935) 76 F. 2d 115, rev'd on other grounds 298 U.S. 639; *Hercules Powder Co.* v. *Bannister,* (6th Cir., 1948) 171 F. 2d 262; *Berry* v. *Franklin Plate Glass Co.,* (W. D. Pa., 1946) 66 F. Supp. 863, 869, aff'd (3d Cir., 1947) 161 F. 2d 184, cert. den. 332 U.S. 767, following *Plazak* v. *Allegheny Steel Co.,* (1936) 324 Pa. 422, 188 Atl. 130, 133; *Schmidt* v. *Merchants Despatch Co.,* (1936) 270 N.Y. 287, 200 N.E. 824, 827; See also *Henson* v. *Dept. of Labor,* (1942) 15 Wash. 2d 384, 130 P. 2d 885, 888.

[5] Appellant's third claim, for breach of contract, was first asserted on November 8, 1949, when he filed his amended libel adding for the first time his new cause of action for breach of an alleged special contract to pay him wages until complete recovery. This was clearly a new claim entirely independent of his original two claims for damages by unseaworthiness and for maintenance. It thus did not relate back to the filing of the original libel. An amendment has been regarded as dating back to the filing of the original suit only where it, as was said in *Seaboard Air Line Ry.* v. *Renn,* (1916) 241 U.S. 290, 293, "merely expanded or amplified what was alleged in support of the cause of action already asserted * * * But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested."

not at any later date. Never thereafter did the United States at any time offer to pay him wages or reinstate him in accordance with his own interpretation of his contract. Appellant cannot assert his claim accrued at any later date. It is elementary that when a contract is breached the wrongdoer either desires the other party to continue performance or to stop. The innocent party may, if the wrongdoer accepts, continue his performance. But not where, as here, nothing remains to be done except to pay, here the repudiation is absolute. The Government's act in terminating appellant according to its own reading of the contract was not an inconsequential trifle having no general significance or pecuniary importance. If appellant's construction of the contract is correct, which we deny, it reached to the very heart of appellant's contract. Limitations thus began running from October 9, 1947, the date of the alleged breach, if breach it was. *Shatte* v. *International Alliance,* (9th Cir., 1950) 182 F. 2d 158, 164, rehearing denied 183 F. 2d 685, cert. den. 340 U.S. 827, and cases there cited, especially *Baron* v. *Kurn,* (1942) 349 Mo. 1202, 164 S.W. 2d 310, 316 and *Taylor* v. *Tulsa Tribune Co.,* (10th Cir., 1943) 136 F. 2d 981, 983.

The apparent omission of the Government's attorneys to insist on the bar of the statute in the court below cannot work a waiver of the rights of the United States. The bar of the statute is jurisdictional and the Government's attorneys may not waive it nor neglect it. *Munro* v. *United States,* (1937) 303 U.S. 36, 41; *Wallace* v. *United States,* (2d Cir., 1944) 142 F. 2d 240, 242. The courts must on their own motion satisfy themselves that limitations have not run and their jurisdiction expired. *Kendall* v. *United States,* (1882) 107 U.S. 123, 125. "Jurisdiction is not a matter of sympathy or favor. The courts are bound to take notice of the limits of their authority." *Reid* v. *United States,* (1908) 211 U.S. 529, 539. It has been re-

peatedly declared that "The right of the plaintiff to recover is a purely statutory right" and jurisdiction, as the Supreme Court said, "cannot be enlarged by implications." *Price* v. *United States,* (1899) 174 U.S. 373, 375. "It matters not what may seem to this court equitable or what obligation we may deem ought to be assumed," the Court continued, "we cannot go beyond the language of the statute and impose a liability which the Government has not declared its willingness to assume."

Indeed, as was said in *Eastern Transp. Co.* v. *United States,* 272 U.S. 675, 686, "The sovereignty of the United States raises a presumption against its suability unless it is clearly shown; nor should a court enlarge its liability to suit beyond what the language requires." So, in another case where a claimant, like appellant here, had slept while his rights became time barred, the Court said, "suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued." *United States* v. *Michel,* (1931) 282 U.S. 656, 659. And "suits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed." *Munro* v. *United States,* (1937) 303 U.S. 36, 41; *United States* v. *Sherwood,* (1941) 312 U.S. 584, 586.

No elaborate citation of cases is necessary to establish that where rights against the United States are concerned, as in all cases of new rights created by statute, the limitation is not procedural but an element of the right and "sets a limit to the existence of what it creates." *Atlantic Coast Line RR. Co.,* v. *Burnette,* (1915) 239 U.S. 199, 201; *Engel* v. *Davenport,* (1926) 271 U.S. 33, 38; *Kakara* v. *United States,* (9th Cir., 1946) 157 F. 2d 578; *Sgambati* v. *United States,* (2d Cir., 1949) 172 F. 2d 297, cert. den. 337 U.S. 930; *Mejia*

v. *United States,* (5th Cir., 1945) 152 F. 2d 686, cert. den. 328 U.S. 862; *Rose* v. *United States,* (E.D. N.Y., 1947) 73 F. Supp. 759.

The Government submits that this matter of limitations without more sustains completely the dismissal of appellant's libel by the court below. But because of the importance of the questions of exclusiveness and election for the administration of the Federal Employees' Compensation Act, the remainder of our brief will discuss those questions with particular emphasis upon the absence in the appellant of any special contract right to full wages until his complete recovery, and of the binding force of appellant's irrevocable election of compensation in accordance with the requirements of the Act of July 1, 1944, c. 373, 58 Stat. 712.

II

Appellant's rights under the applicable compensation, leave and retirement statutes are exclusive of recovery by suit; the nature of the operation of civil service manned Army and Navy vessels confirms the necessity of this result.

Appellant's recovery on his first and second claims, for damages by unseaworthiness and for maintenance money, is precluded by the existence of his rights under the applicable system of compensation, leave and retirement statutes. The Government submits that absent an explicit statutory command for double recovery or election, where compensation is available the right thereto of government personnel, whether in the civil or military service, is exclusive and precludes the existence of any cause of action for service-incident injury or disease despite the undoubted existence of a judicial remedy for the enforcement of such a cause of action if there was one. This view of the matter, recently ap-

plied by the Supreme Court in *Feres* v. *United States,* (1950) 340 U.S. 135, to military service employees, has equally been applied to civil employees by the Courts of Appeals for the Second, Third, Fifth and District of Columbia Circuits. *Mandel* v. *United States,* (3d Cir., decided August 16, 1951); *Johansen* v. *United States,* (2d Cir., decided July 30, 1951); *Lewis* v. *United States,* (D.C. Cir., 1951) 190 F. 2d 22; *Posey* v. *Tennessee Valley Authority,* (5th Cir., 1937) 93 F. 2d 726. See also *O'Neal* v. *United States,* (E.D. N.Y., 1925) 11 F. 2d 869, aff'd (2d Cir., 1926) 11 F. 2d 871; *Lopez* v. *United States,* (S.D. N.Y., 1944) 59 F. Supp. 831. The Fourth Circuit alone has explicitly held the contrary. *United States* v. *Marine,* (4th Cir., 1946) 155 F. 2d 456, followed in *Johnson* v. *United States,* (4th Cir., 1950) 186 F. 2d 120.

We submit that this unanimity of decision in four circuits should be accepted by this Court as controlling in this present case, despite the minority view of the Fourth Circuit. If accepted, it is dispositive of appellant's entire case except in respect of his third claim, for damages for breach of an alleged special contract to pay him full wages until fully recovered. This special contract claim of appellant is discussed hereafter (Points III and IV, *infra;* pp. 27-39). So far as concerns the rights of appellant on his first and second claims, for unseaworthiness and for maintenance money under the general law maritime, whether statute or jurisprudence, we believe that the principles established by these majority decisions dispose of every contention which can be presented in this case. Those cases settle that in every instance, unless Congress has in express terms provided for double recovery or election, all government personnel, of whatever type, civil or military, afloat or ashore, are limited exclusively to their recovery under the particular compensation, leave and

retirement statutes applicable to employees of their type and cannot recover for service-incident injury or illness by suit against the United States.

In particular the *Mandel, Johansen* and *Lopez* cases, dealing with members of the civilian component of the crew of Army Transport vessels, such as appellant here, establish that their rights as government employees to benefits under the applicable compensation, leave and retirement acts, precludes them from the grant of the rights given by the War Shipping Administration (Clarification) Act to Government merchant seamen. They further expressly declare that the compensation amendment Act of October 14, 1949, c. 691, 63 Stat. 854, did not alter or affect in any way the previous exclusive rights of the civilian component of the crew of Army and Navy vessels. See *Mandel* v. *United States,* where the Third Circuit said (slip op. p. 4, fn. 8), "What little legislative history is available indicates only that Congress did not wish to legislate affirmatively on the rights of seamen because no discussions of the problem had been had in committee." And see the similar statement of the district court in *Johansen,* (S.D. N.Y.) 1951 A.M.C. 117 (aff'd 2d Cir., July 30, 1951) that "It is plain that the amendments of 1949 were not intended to change the prior rights of seamen except to the extent of further coverage under the Act." The reason for this continued exclusiveness of compensation where civilian crew members of Army and Navy vessels are involved is obvious upon consideration of the nature of their operations and the legislative history of the Clarification Act of 1943.

The vessels of the Army Transport Service, now succeeded by the Military Sea Transportation Service, whether troop transports or hospital ships (see *Lopez, supra*) or tugs (see *Mandel, supra*) are not merchant vessels but auxiliaries to the fleet and are operated for

the military function of transporting troops and their supplies in forward areas.[6] The employment of these vessels in an integral part of military operations frequently involving their use, as in the *Mandel* case, in the immediate presence of the enemy. It is for that reason that the military authorities have absolute power of control over their personnel, both military and civilian, enforced by the most rigorous sanctions. Army transport tugs and ships are in all respects military vessels with crews whose members, civilian and military alike, are subject to military law. "It is unthinkable that Congress did not mean to include persons in the United States Army Transport Service, engaged in transporting our armies and sustaining them with equipment and supplies." *Ex parte Falls,* (D. N.J., 1918) 251 Fed. 415, 416; *Ex parte Gerlach,* (S.D. N.Y., 1917) 247 Fed. 616. See also the preliminary paragraph of appellant's permanent agreement of enrollment, Libelant's Exhibit 4, Appx. 16a).

Most of these Army and Navy transport vessels have crews consisting of both military and civil components. Thus, on hospital ships, the deck and engine room force are civil employees while the medical crew are in the military service. The status of both the civil and military service components of the crews of these vessels is similar; their rights and discipline are similar, except that the civilans are free to quit at the end of any voyage. See *Mandel* (slip op. p. 5); *Johansen* (slip op. p. 1764).

Such civil service crew members of army and navy vessels resemble in no way the merchant seamen of

[6] The carriage of civilian government employees, of dependents of military and civil service personnel, and of evacuees, together with the personal and household effects of such persons, is a secondary activity. When undertaken, it is solely in furtherance of the Government's interest, not for profit, and only when space would otherwise not be used.

private vessels nor the merchant seamen of vessels of the former War Shipping Administration and its new successor, the National Shipping Authority. Their resemblance is much closer to that of the military crew members of the military service component of the crew who stand beside them on the deck exposed to the same risks and subject to the same orders. Congress could not have contemplated that the civil service component of the crew of armed forces vessels should enjoy at once both the right to compensation, leave and retirement benefits, which the military service component enjoys and at the same time the right of recovery by suit against the United States which is the exclusive right of WSA merchant seamen. It is impossible to believe that Congress, while limiting military service crew members to compensation, leave and retirement rights and excluding merchant crew members therefrom and making their right of recovery by suit exclusive, intended civil service crew members of armed forces vessels to enjoy both types of rights or the chance to elect between them. We believe, as Mr. Justice Jackson said in *Feres* v. *United States,* (1950) 340 U.S. 135, 144, that the absence of explicit statutory direction by Congress for double recovery or election is persuasive that the rights under the applicable, compensation leave and retirement statutes were regarded as exclusive.

If recovery by suit for service-incident injury or illness of civil service crew members of armed forces and other regular public vessels was available in addition to their compensation, leave and retirement rights, the adoption of the War Shipping Administration (Clarification) Act, 1943, (57 Stat. 45, as amended, 50 Appx. U.S.C. 1291) would, as the Second Circuit pointed out in *Bradey* v. *United States,* (2d Cir., 1945) 151 F. 2d 742, 743, cert. den. 326 U.S. 795, have been

unnecessary. When World War II began it was already the law of two circuits (and no conflict existed elsewhere) that suits for death and injury of persons other than crew-members of the public vessel involved could be brought under the Public Vessels Act in accordance with its literal language. *Dobson* v. *United States,* (2d Cir., 1928) 27 F. 2d 807, 808, cert. den. 278 U.S. 653; *New England Maritime Co.* v. *United States,* (1st Cir., 1934) 73 F. 2d 1016, affirming per curiam (D. Mass., 1932) 55 F. 2d 674, 685. Thus it was only because of the belief, in Congress and elsewhere, that the right to compensation benefits would preclude any right of recovery by suit on the part of civil service crew members of public vessels that such legislation was necessary at all.

The general understanding in and out of Congress at that time was that the exclusive right of both civil and military service crew members of armed forces vessels was compensation, and that WSA merchant seamen were being fairly dealt with when they were given in exchange for the government seamen's right of compensation the same right of recovery by suit, but without compensation, which had always been the exclusive right not only of private merchant seamen, but of government merchant seamen engaged in the peacetime commercial operations of the Shipping Board and Maritime Commission.[7] This understanding was emphasized in the report of the Chairman of the Compensation Commission to the House Merchant Marine Committee commenting on the clarification bill. It stated:

> It is the Commission's understanding of the proposed legislation that its application is to be limited to seamen employed by or on behalf of

[7] This was the consequence of certain unpublished decisions of the Comptroller General, see our *Vatuone* brief, p. 52, fn. 19.

> the War Shipping Administration, and that the rights heretofore long enjoyed by seamen in other Federal services, who have acquired status as civil employees of the United States, will not be disturbed or affected. In this connection it may be pointed out that in services such as the Army Transport Service, seamen have been employed directly as civil employees of the United States and for many years have received the protection of the Federal Employees' Compensation Act.
>
> As to seamen in the Army Transport Service, it should be noted that the protection afforded by the Federal Employees' Compensation Act is far greater than that contemplated for seamen by the bill, H. R. 7424. The bill apparently would merely provide a basis for recovery of damages for injury or death only in the very limited class of cases where the employer was negligent. * * * [8]

Congress took this action as to War Shipping Administration seamen because it was thought undesirable to assimilate the rights of the large numbers of merchant seamen (temporarily in government service in order to man the cargo vessels supporting the war effort and which it was expected would be regarded as not in merchant but in exclusively public vessel employment) to those of the Army Transport seamen, who worked alongside their military associates, and to other peacetime public vessel seamen who were regular government employees under the Federal Employees' Compensation Act and the regular leave and Civil

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[8] House Merchant Marine and Fisheries Committee, 77th Cong., 2d Sess., Hearings on H.R. 7424 (Sept. 2, 1942), p. 6; H. Rep. 107, 78th Cong., 1st Sess., p. 34. Cf. *Mandel* v. *United States*, (3d Cir., August 16, 1951, slip op. p. 5), "We think that in general the natural inference would be that the [Federal Employees'] Compensation Act represents the substitution of a more enlightened form of remedy for industrial accidents than the ordinary tort action for damages."

Service Retirement Acts.[9] In explaining to Congress the situation which induced the War Shipping Administration to ask for this status for its seamen, its General Counsel stated:[10]

> As private employees, seamen are entitled to the protection of the old-age benefit provision of the Social Security System; they and their dependents may recover damages for injury or death of seamen through the provisions of the Jones Act, they are protected by other remedies and they have certain rights with respect to allocations of wages. When the same seamen work on vessels which are bareboated or owned by the War Shipping Administration they become Government employees and these rights, which union labor has learned to prize very highly, either cease to exist or are substantially impared [where vessels are not employed as merchant vessels but solely as public vessels]. In exchange for such lost privileges, these seamen acquire special privileges of Government employees such as right to compensation for injury under the United States Compensation Act, a questionable right to retirement benefits and other rights peculiar to Government employees.
>
> Seamen constantly interchange between time chartered vessels on which they are private em-

[9] In February and March 1942, when War Shipping Administration was created and proceeded to requisition the American merchant fleet and inaugurate its plan for direct government operation, the entire merchant fleet was privately operated, employing some 55,000 seamen. Ninety percent of the 1,375 ocean-going vessels were privately owned. Ten percent were government-owned but were demised by the Maritime Commission for private operation. Less than 50 comparable public vessels, plus a few tugs and harbor craft, were operated by the Army Transport Service with civilian crews. On V-J day in August 1945, there were over 220,000 seamen manning some 4,300 vessels which remained of the 5,200 ships built by the Maritime Commission plus the original 1,375.

[10] House Merchant Marine and Fisheries Committee, 77th Cong., 2d Sess., Hearings on H. R. 7424 (Sept. 2, 1942), p. 14.

> ployees, and bareboated or owned vessels on which the personnel becomes employees of the Government. The rights of seamen may thus change from voyage to voyage depending upon the particular status of the vessel upon which they happen to sail. In view of the interchangeability of seamen, this creates many administrative difficulties. Moreover, it seems to us that since the interval of Government operation represents but a temporary phase of the history of the merchant marine, it would be best to maintain the status of seamen as private employees with respect to such matters. [Matter in brackets supplied.]

In the course of the consideration of the Clarification Act, it was emphasized again and again that *merchant* seamen employed on Maritime Commission *merchant* vessels had *exclusively* the ordinary merchant seamen's rights against the United States *under the Suits in Admiralty Act.* But seamen employed on vessels engaged solely as *public vessels,* and not within the Suits in Admiralty Act, would have their exclusive recovery by compensation payments.[11] It was only to prevent any possibility of War Shipping Administration seamen being assimilated to army and navy and other regular public vessel seamen (whose compensation rights were recognized as exclusive) that the legislation was necessary. This legislative history thus confirms, as the Second Circuit recognized in *Bradey* v. *United States,* (2d Cir., 1945) 151 F. 2d 742, 743, that Congress intended compensation to provide both the military and civil service crew members of armed forces vessels with their exclusive recovery and such seamen were not to be given a right to sue the United

[11] See S. Rep. 62, 78th Cong., 1st Sess., p. 5; H. Rep. 107, 78th Cong., 1st Sess., pp. 16, 34; S. Rep. 1813, 77th Cong., 2d Sess., p. 23; S. Rep. 1655, 77th Cong., 2d Sess., p. 19; H. Rep. 2572, 77th Cong., 2d Sess., p. 9. Maritime Commission merchant seamen had no right, under the Comptroller General's decisions, to compensation. See our *Vatuone* brief, p. 52, fn. 19.

States for the negligence of their military superiors and fellow crew members nor for the defects of their ships. Had this not been so the Clarification Act would have been unnecessary.

In our brief in the companion case, No. 12,906, *United States* v. *Vatuone,* we have discussed the various decisions and have argued in detail the reasons for the correctness of the majority rule adopted by four circuits and the absence of any reason for this Court to depart from it. We do not repeat that argument here but ask the Court to refer to our *Vatuone* brief for its complete presentation. The remainder of our argument in this brief, therefore, will deal only with the special questions presented by appellant's third claim, for breach of his alleged special contract for payment of full wages until his complete recovery. We will first examine, in Point III, whether there was such a special contractual undertaking by the United States, and then, in Point IV, whether appellant may avoid the irrevocable election which Congress by the Act of July 1, 1944, c. 373, 58 Stat. 712, prescribed as a condition precedent to payment of compensation benefits instead of any payments on benefits otherwise available by reason of the injury or illness of an employee in the government service.

III

Appellant has no claim for wages after his termination; his agreement of enrollment and the applicable regulations provided for wages only until his return to the continental United States.

Appellant was paid full wages until his termination on October 9, 1947, following his return to the continental United States. His third claim is that, under his special contract of employment, even after his termination he still should have been paid full wages until his complete recovery. This he claims by reason

of one of the clauses of "paragraph 6" (apparently Article 7 is meant) of his original one-year employment contract of May 27, 1944 (Brief, pp. 9-10; Am. Lib. Arts. 18-24, R. 6-8, Appx. 4a-6a).

It is the Government's contention (1) that under appellant's permanent agreement of enrollment of March 14, 1945, which alone was in effect at the time of his termination on October 9, 1947, appellant was not entitled to wages after termination; (2) that appellant's original one-year employment contract of May 27, 1944, expired on May 27, 1945, if not before, was never renewed, and was not in effect at any time during his voyages, beginning July 5, 1945, and ending on July 8, 1947, out of which this present lawsuit arises; and (3) that in any event even appellant's unrenewed 1944 one-year employment contract did not provide for payment of wages after the contract period expired and appellant was terminated.

Appellant has received all wages to which he was entitled both as a seaman and as a government employee. As a seaman he was entitled under the general law maritime to wages only until his discharge at the conclusion of his last voyage on July 8, 1947.[12] As a government employee, under the applicable Marine Personnel Regulations of the Transportation Corps (by which appellant both in his 1945 permanent agreement of enrollment and in his original 1944 one-year employment contract agreed to be bound) appellant was entitled to wages, after discharge from his last voyage, only until he was returned to the continental United States.[13] And, even under Articles 7 and 13

[12] *The Bouker No. 2* (2d Cir., 1917) 241 Fed. 831; *The E. H. Russell,* (E.D. N.Y., 1930) 42 F. 2d 568; *Crespo* v. *International Freighting Corp.,* 1948 A.M.C. 988.

[13] Regulation No 13, section 2, paras. 132.5-132.6, Regulation 16, section 3, para. 163.2, *infra,* Appx. 29a, 30a.

of appellant's unrenewed 1944 one-year employment contract (Libelant's Exhibit 3, Appx. 12a, 13a), appellant was not entitled to wages after his return to the continental United States.

1. Appellant's permanent agreement of enrollment, dated March 14, 1945 (Libelant's Exhibit 4, Appx. 15a), was effective from prior to his departure on his first South Pacific voyage from Los Angeles on July 5, 1945, and until his final termination on October 9, 1945, following his return to the continental United States. It provided that the entire matter of his employment rights should be determined by the sole will of the United States according to the War Department's regulations. By the terms of the agreement appellant enrolled "in accord with the conditions prescribed by law and regulations pertinent to such service," and agreed "to abide by the rules, regulations, customs and discipline of the service as may be now or hereafter established." The agreement further stated that appellant understood and agreed (Appx. 16a) that—

> * * * this constitutes an agreement of enrollment supplemental to my appointment as an employee of the Government under Civil Service Rules, Schedule A-IV-3 thereof, and that I am entitled to pertinent civil service rights, privileges and benefits thereunder, including special benefits applicable to marine employees of the War Department as may be pertinent thereto in accord with law and regulations.
>
> * * * * * * * *
>
> * * * if the Government should exercise its right to relieve me prior to the conclusion of this term of enrollment for whatever reason, I may be disenrolled and my employment terminated at the pleasure of the Government and under such circumstances I shall have no further right or claim against the Government whatsoever, except as may be provided by law or regulations now or hereafter to be established.

Finally appellant agreed "to accept the Government's sole determination of the degree to which the Government adheres to the prevailing practice, as may be set forth now or hereafter in the rules and regulations promulgated by the Government with respect to employment on its vessels."

The Transportation Corps' regulations (*infra,* Appx. 29a), by which appellant thus agreed to be bound, provided that in the case of injury or illness not occasioned by the seaman's own delinquency or misconduct—

> The basic wages will continue payable only until the conclusion of the voyage had the seaman continued to serve upon the vessel or until he returns to the continental limits of the United States, whichever is sooner. (Para. 132.6, Appx. 29a; cf. para. 163.2, Appx. 30a)

Thus in no event is appellant entitled under his special contract of employment, any more than under the general law maritime, to payment of full wages after his termination until his complete recovery.

Appellant was paid until his termination on October 9, 1947, long after his discharge at the conclusion of his voyage on July 8, 1947, and sometime after his return to the United States. This payment exceeded the requirements of the maritime law and constituted the "prevailing practice" according to the Government's "determination" which appellant had agreed to accept. Appellant has thus received both what he was entitled to as a seaman and as a government employee and has no right to anything more.

2. Appellant's original one-year employment contract of May 27, 1944, expired on May 27, 1945, was never renewed and therefore has no bearing on this case. Appellant's unrenewed one-year employment contract of May 27, 1944 (Libelant's Exhibit 3, Appx. 11a-15a), provided that he—

> * * * is hereby employed and agrees to serve on a vessel owned, operated, chartered, employed or controlled by the War Department, at any post of duty in the world to which he may be assigned, to be determined by the Government, for a period of one year from the effective date of this contract [Article 1].
>
> * * * * * * * *
>
> The period of service covered by this contract may be extended from year to year or any part thereof *upon agreement of both parties in writing prior to the completion of the one (1) year period of service* under this contract, or any succeeding renewed one (1) year period or any part thereof, *in which case* all the conditions applying to the contract during the first year will in like manner apply to each renewed year. * * * [Article 17, emphasis supplied]

Since appellant's one-year contract was not renewed in writing or otherwise, it therefore expired not later than May 27, 1945,—long before the voyages beginning July 5, 1945, which are here involved. It thus has no bearing whatever on the case.

Indeed, appellant urged in his amended libel, and the court below found, that subsequent to appellant's 1944 one-year contract "a new contract was entered into between libelant and the United States of America by and through [the] Army Transport Service for [the] duration of the war" (Am. Lib. Art. 18, incorporating Art. 2, R. 6 and 3, Appx. 4a, 1a; Fndg. I, R. 35, Appx. 8a). This finding and allegation appears clearly correct and there is no evidence whatsoever to suggest that the 1944 one-year contract was ever renewed. To renew it would have been entirely inconsistent with appellant's action, prior to its expiration date of May 27, 1945, of enrolling as a permanent Army Transport employee for the duration of the war plus six months. The Army's Marine Personnel Regulations seem to make it plain that the

one-year renewable contract status and the permanently enrolled status are not only entirely distinct but even incompatible (Regulation No. 3, section 2, paras. 32.1 through 32.3, *infra,* Appx. 28a). Accordingly, the provisions of Article 7, or any other provision of Appellant's 1944 one-year contract have no bearing on his rights under his later permanent enrollment agreement.

3. But even if appellant's claim had arisen in 1944 under his unrenewed one-year contract (Libelant's Exhibit 3, Appx. 11a) still appellant would not be entitled to wages after his termination or the expiration of his contract. This is obvious from a critical reading of the whole of Articles 7 and 13 of the original 1944 one-year contract. They provide (Appx. 12a, 13a):

> 7. The Employee shall be furnished medical and surgical care at the expense of the Government for illness or injury sustained while in line of duty not resulting from the Employee's own misconduct or delinquency. In the event of illness or injury occasioned by his employment but not due to the Employee's misconduct, the base wages of the Employee will continue during the period of such incapacity. Any such payments made shall be deemed payments on account of or in full, as the case may be, of any other compensation for sick leave to which the Employee might be entitled on account of such injury or illness. The Government will furnish, or otherwise provide without cost to the Employee, such medical treatment and hospitalization including subsistence as is necessary for the proper treatment of any such injury suffered or illness contracted while working for the Government; provided, such medical treatment or hospitalization will not be continued if the disability resulting from such injury or illness, in the judgment of a duly appointed medical officer of the United States Army or such other physician as may be designated by the Government, cannot be materially improved by further treatment or hos-

pitalization; and, in this event, the Government may terminate this contract in writing. Upon such termination, the Employee will be returned, at the expense of the Government, to the most convenient port in the United States, to be determined by the Government and at the option of the Employee to the port of his original departure from the United States.

* * * * * * * *

13. In the event that the Employee is unable to meet the satisfaction of the Government its standards and requirements for employment for the position in the within contract, the Government may cancel this contract and his employment, upon notice in writing to the Employee in which event, the Employee shall have no further rights under this contract or claim against the Government whatsoever, except that, if at the time of termination the Employee be at his post of duty outside the continental limits of the United States, the Employee shall be returned at the expense and convenience of the Government to the nearest continental United States port and continue his base wages hereunder until such arrival.

Article 7 directs that, although the seaman has not recovered and before the expiration of the one-year contract period, if the Government's doctors say the seaman cannot be "materially improved by further treatment," the Government may terminate the contract and "Upon such termination the employee will be returned, at the expense of the Government, to the most convenient port in the United States" or, at the employee's election, to his original port of departure from the United States. Article 13, provides that in cases of this sort the Government will "continue his base wages hereunder *until such arrival"* (emphasis supplied). Finally, by Article 18 of his 1944 one-year contract (Appx. 14a), appellant agreed to abide and be governed "by the rules, regulations, customs and dis-

cipline of the service." These as we have already seen (*supra,* pp. 29-30) provided for payment of wages only until his return to the continental United States.

It thus appears that appellant's special contract rights do not include wages after his termination. This is equally so whether his original 1944 one-year employment contract or his 1945 permanent agreement of enrollment applied at the time he was terminated on October 9, 1947.

IV

Appellant's acceptance of compensation precludes his recovery of wages just as his compensation, leave and retirement rights preclude his recovery for negligence, unseaworthiness and maintenance.

Appellant's third claim is for payment of his full wages until his complete recovery by reason of his special contract of employment.[14] He complains against being required to elect between pursuing this claim and receiving compensation and asserts a right to collect such wages despite his election. This is, however, absolutely prohibited by the express statutory language of the original compensation act of 1916. He cannot be successful in such a claim since compensation has been paid him and is still being accepted by him every month. Section 7 of the original 1916 Act (*supra,* p. 3) ex-

[14] Appellant alleges he was terminated and paid to October 9, 1947. This was a time long after the end of his voyage on July 8, 1947. Under the general law maritime wages are not due after the end of the voyage—or of the next pay period thereafter when the man is employed by the month or week. *The Bouker No.* 2, (2d Cir., 1917) 241 Fed. 831; *The E. H. Russell,* (E.D. N.Y., 1930) 42 F. 2d 568; *Crespo* v. *International Freighting Corp.,* 1948 A.M.C. 988. Anything more must rest upon the terms of some special contract right, hence appellant's reliance on his special employment contract here.

pressly forbids payment of unearned wages. It provides:

> That as long as the employee is in receipt of compensation under this act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed * * *

Thus any attempt to insert a contrary provision in the contract, such as appellant claims to enjoy here, would be absolutely void.

Appellant's argument, that any modifications of the statutes subsequent to the execution of his first employment contract of May 27, 1944, are invalid as an unconstitutional abrogation of his contract, is thus totally irrelevant to the facts of this case. No amendment has changed the 1916 law. The amendment of July 1, 1944, is purely procedural, requiring execution of a formal election document so as to avoid any contention that a claimant did not know that under section 7 of the original 1916 act application for compensation would bar him from all other claims. So the amendment of October 14, 1949, is purely declaratory of the pre-existing 1916 bar, merely stating the Federal Employees Compensation Act's exclusiveness in the more familiar form found in section 5 of the Longshoremen's Act (33 U.S.C. 905), so that there might be an end of the Fourth Circuit's minority view to the contrary. In any case, by its express terms and legislative history it does not apply to seamen whose rights are left the same as under the original 1916 law. See our *Vatuone* brief pp. 51-59. Both amendments leave appellant here just where he would have been if his entire case had occurred before May 27, 1944, when he was first employed. He may not collect both compensation and full wages. When he

elected to accept compensation payments, rather than continue with his contested claim for wages, it ended his claim although he failed to dismiss his law suit as was expected by the government officers who accepted his election as executed in good faith.

Appellant's original one-year employment contract was executed on May 27, 1944, his permanent agreement of enrollment on March 14, 1945. Shortly after the execution of his 1944 one-year contract and sometime before his execution of his permanent enrollment agreement, Congress adopted the Act of July 1, 1944, c. 373, 58 Stat. 712 (*supra,* p. 3). This act required, thereafter, as a condition precedent to payment of compensation to a government employee such as appellant, who claims to be entitled both to benefits under the Federal Employees' Compensation Act and also to other benefits because of his injury or illness in government service, that—

> * * * such person shall elect which benefits he shall receive. Such election shall be made within one year after the injury or death, or such further time as the Commission may for good cause allow, and *when made shall be irrevocable unless otherwise provided by law.* [Emphasis supplied]

Pursuant to this statutory requirement, appellant's award of compensation provided (Appx. 20a) that before any compensation payments could be made to him thereunder he must execute an irrevocable election in a special form prescribed for that purpose and attached to the award.[15]

Copies of the award, dated May 26, 1950 (Appx. 18a), of the election form and of the letter of May 31, 1950

[15] This was in accordance with section 32 of the 1916 Act (5 U.S.C. 783) providing "That the Commission is authorized to make necessary rules and regulations for the enforcement of this Act, and shall decide all questions arising under this Act."

(Appx. 21a), transmitting them, were sent to appellant's attorney as well as to appellant himself. The election form did not require its execution by appellant's attorney as well as appellant. But there seems no doubt, in view of appellant's delay in executing the election until July 21, 1950, that appellant fully understood the significance of what he was doing and may have consulted his attorney. Indeed it does not appear that appellant claims that he was in any way misled. On the contrary, his contention, aside from "unconstitutionality," is that he took the compensation, albeit voluntarily, but under economic duress and coercion and is now entitled to repudiate his decision although he continues to collect payments every month. Thus, despite the 1916 prohibition against payment of "any salary, pay or remuneration whatsoever" while payments of compensation are available, appellant is here asking this Court to relieve him from the burden of the Congressional command.

It admits of no doubt that appellant's obligation is to know the law and to be bound by the legal consequences of his acts. Even the avuncular indulgence, which seamen enjoy by reason of their privileged status as wards of the admiralty judges, ought not to be enlarged to relieve Chief Engineer Allen of this obligation. Officers and members of the crews of vessels are not yet entirely above the laws which govern ordinary citizens. *Cf. Bohannon* v. *American Petroleum Transport Corp.,* (S.D. N.Y., 1949) 86 F. Supp. 1003, applying to a seaman the ordinary rule of *Federal Crop Ins. Co.* v. *Merrill,* (1947) 332 U.S. 380, and prior cases therein cited. Appellant acted with full knowledge and should be bound. The leading decision on the point is one by Justice Cardozo in a case arising prior to the Longshoremen's Compensation Act when all maritime workers were "seamen" under federal law. *Brassel* v. *Electric*

Welding Co., (1924) 239 N.Y. 78, 145 N.E. 745, 746. There he said:

> * * * The question is whether a right of action has survived the collection of the award and the retention of the proceeds. The plaintiff made claim under the statute and must be charged with knowledge of its provisions. * * * The situation is much the same as if an owner of a patent, after suing for infringement in a state court and pocketing the proceeds of a judgment in his favor, were to urge the exclusive jurisdiction of the federal courts as a reason why damages should be paid to him again. Consent and the estoppel flowing from consent would put him out of court. *Davis* v. *Wakelee,* 156 U.S. 680, 15 S. Ct. 555, 39 L. Ed. 578. Nor does the plaintiff help his case by crediting what he has received upon the damages recovered. By such a use of the money, payments made and accepted for one purpose are diverted to another. The defendant did not tender payment upon account of an unliquidated claim for damages to be enforced thereafter without prejudice, nor is there any evidence that the plaintiff so understood the effect of the acceptance. The payment was in full.

So in *Owens* v. *Hammond,* (N.D. Calif., 1934) 8. F. Supp. 392, a crew member, after having sought and obtained a compensation award, brought a libel in admiralty. His suit was dismissed, the court observing, "by the acceptance of the award * * * an accord and satisfaction was reached upon libelant's claims arising from the injury in question, and he may not recover again in this court." Thus also in *The Fred E. Sander,* (W.D. Wash., 1914) 212 Fed. 545, 548, the court said, "If the libelant determined to obtain relief * * * under such act, then he cannot proceed in admiralty and thus obtain double compensation for the injury * * * [for he] has elected to accept under the act, and cannot therefore raise an action in admiralty."

We submit therefore that just as appellant's first two claims, for unseaworthiness and for maintenance money, are precluded by his rights to compensation, leave and retirement, so his third claim of a special contract right to full wages until complete recovery, is precluded by the statutory prohibition against payment of wages or salary after payment of compensation and by his election pursuant to the 1944 amendment.

CONCLUSION

For the foregoing reasons we believe (1) that the first amended libel was barred by limitations, (2) that recovery on appellant's claims for unseaworthiness and maintenance money is precluded by his exclusive right to compensation benefits, and (3) that appellant's claim for breach of contract to pay full wages until complete recovery is precluded by his acceptance of compensation. The dismissal of the amended libel by the court below was therefore correct and should be affirmed.

Respectfully submitted,

JAMES R. BROWNING,
Acting Assistant Attorney General,

ERNEST A. TOLIN,
United States Attorney,

LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistants to the Attorney General,

BERNARD B. LAVEN,
Assistant United States Attorney,
Attorneys for the United States.

September 1951.

APPENDIX

1. FIRST AMENDED LIBEL IN PERSONAM

[Title of Court and Cause Omitted; endorsed, filed Nov. 8, 1949]

The libel of Jesse M. Allen, against the United States of America, in a cause of damages, maintenance and cure, civil and maritime, respectively shows:

FIRST: That upon information and belief, at all times herein mentioned, the respondent United States of America, was the owner of the United States Army FS 411, FS 292, BC 514, USAT ETOLIE, and FS 370.

SECOND: That on or about the 27th day of May, 1944, libelant executed a written contract with respondent for employment in the Army Transport Service for a period of one year as a Junior Marine Officer (Engine), commencing May 27, 1944, at wages at the minimum rate of $2200.00 per annum, overtime and bonus. That thereafter on March 14th, 1945, a new contract was entered into between libelant and the United States of America by and through Army Transport Service for duration of the war plus six months at wages, overtime and bonus, in accordance with the prevailing maritime practice.

THIRD: That libelant was a member of the crew of the FS 292, which commenced a voyage at Los Angeles Port of Embarkation, Wilmington, California, on the 5th day of July, 1945. Said voyage was to the Islands of the South Pacific and terminated on or about the 26th day of May, 1946, at Apra Harbor, Guam. That on the said 26th day of May, 1946, libelant was assigned as First Assistant Engineer on the FS 411 at Apra Harbor, Guam, and continued to serve thereon until the 8th

day of July, 1947. That during said voyage on or about the 11th day of June, 1946, libelant was promoted to Chief Engineer and remained as such until the termination of said voyage.

FOURTH: That the respondent failed to provide libelant with seaworthy vessels. That on the initial voyage of the FS 411 from Guam to Japan, said vessel broke down and libelant was required to perform labor beyond the call of duty, working for long hours, in smoke and gas fumes, without proper or any oxygen breathing equipment; that thereafter during libelant's service upon the FS-411 said vessel broke down on seven different voyages during which times libelant was required to perform labor beyond the call of duty, working as many as twenty hours a day, in smoke and fumes without proper or any oxygen breathing equipment.

FIFTH: That the respondent failed to furnish libelant with a seaworthy vessel in that the ventilating system upon said vessel, including the exhaust fans in the engine room, were inoperative for over a period of fourteen months. That libelant was required to work and live under conditions of extreme heat without adequate or any ventilation, and that by reason of the said vessel, the FS 411, breaking down at sea on approximately twelve occasions, the said FS 411 and FS 370 did not have adequate or proper water and food for libelant's necessary daily use.

SIXTH: That as a proximate result of the aforesaid conditions, libelant became ill with tuberculosis. That said illness from which libelant was suffering was diagnosed as tuberculosis on or about the 25th day of October, 1947.

SEVENTH: That by reason of the premises as aforesaid, libelant has been generally damaged in the sum of Fifty Thousand Dollars ($50,000.00).

EIGHTH: That at all times herein mentioned, libelant was and is a resident of the County of Los Angeles, State of California, and within the jurisdiction of the United States District Court in and for the Southern District of California, Central Division.

NINTH: That this action is brought pursuant to the provisions of Public Vessels Act, 46 U.S.C.A., Section 781 Seq.

TENTH: That libelant is a seaman within the designation of persons permitted to sue herein without furnishing bond for, or prepayment of, or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Sec. 1916, U.S.C.A.

ELEVENTH: That at all times herein mentioned, libelant was an employee of the United States of America by and through the Army Transport Service.

TWELFTH: That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of this Honorable Court.

FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF ACTION, libelant alleges:

THIRTEENTH: Libelant refers to Articles One to Six, and Eight to Twelve and incorporates the same herein and makes the same a part hereof as if they are fully set forth.

FOURTEENTH: That by reason of the premises herein libelant became totally disabled from any work on or about the 25th day of October, 1947, and will remain totally disabled from any occupation for a period of from two to three years from the date hereof.

FIFTEENTH: That by reason of the premises herein, libelant is entitled to recover from the respondent

the United States of America, maintenance in the sum of $6.50 per day from the 19th day of January, 1948, to the date hereof, and thereafter until he has reached the maximum degree of recovery.

SIXTEENTH: That the maintenance to which libelant is entitled to the date hereof was and is the sum of $6,418.00; that libelant prays leave to amend this article at the time of trial and therein set forth the amount of maintenance to which he is entitled at that date.

SEVENTEENTH: That libelant has been under the care of duly licensed physicians and surgeons in the treatment of his illness from August 1947, to the date hereof, and will so remain for two to three years from the date hereof.

FOR A THIRD, SEPARATE AND DISTINCT CAUSE OF ACTION, libelant alleges:

EIGHTEENTH: Libelant incorporates herein by reference and makes a part hereof as if fully set forth herein, Articles First to Sixth, and Eighth to Twelfth inclusive, of his First Cause of Action.

NINETEENTH: That pursuant to contract of employment entered into by libelant with respondent, said contract provided in part as follows: The Employee shall be furnished medical and surgical care at the expense of the Government for illness or injury sustained while in line of duty not resulting from the Employee's own misconduct or delinquency. In the event of illness or injury occasioned by his employment but not due to the Employee's misconduct, the base wages of the Employee will continue during the period of such incapacity. Any such payments made shall be deemed payments on account of or in full, as the case may be, of any other compensation for sick leave to

which the Employee might be entitled on account of such injury or illness. The Government will furnish or otherwise provide without cost to the Employee, such medical treatment and hospitalization including subsistence as is necessary for the proper treatment of any such injury suffered or illness contracted while working for the Government provided, such medical treatment or hospitalization will not be continued if the disability resulting from such injury or illness, in the judgment of a duly appointed medical officer of the United States Army or such other physician as may be designated by the Government, cannot be materially improved by further treatment or hospitalization, and, in this event, the Government may terminate this contract in writing. Upon such termination, the Employee will be returned, at the expense of the Government, to the most convenient port in the United States, to be determined by the Government and at the option of the Employee to the port of his original departure from the United States.

TWENTIETH: At the time libelant became ill with tuberculosis, as aforesaid, his base wages pursuant to a contract entered into between libelant and respondent on the 27th day of May, 1944, as amended, was the sum of $6,997.00.

TWENTY-FIRST: That on the 9th day of October, 1947, respondent herein terminated wage payments to libelant herein under his contract of employment.

TWENTY-SECOND: That libelant has been totally disabled from the 25th day of October, 1947 by reason of the illness as aforesaid and will remain totally disabled for a period of not less than two years from the date hereof. this 4th day of November, 1949.

TWENTY-THIRD: That by reason of the premises as aforesaid, libelant is entitled to recover from re-

spondent his base wages in the sum of $6,997.00 per year from the 25th day of October, 1947, to the termination of his disability occasioned by the illness incurred in his employment as aforesaid.

TWENTY-FOURTH: That by reason of the premises herein, libelant is entitled to recover from respondent pursuant to his contract of employment for wages during the period of his disability by reason of illness, the sum of $14,204.65. That libelant prays to amend this article at the time of trial to set forth therein the sum of money which he is entitled to recover at that date pursuant to his contract of employment.

WHEREFORE, libelant prays that a citation in due form of law, according to the course of this Honorable Court in cases of Admiralty and Maritime jurisdiction, may issue against the respondent United States of America, and that they may be required to appear and answer this libel and all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree payment to libelant by respondent United States of America of $70,622.65, together with his costs of suit incurred herein and for such further relief as may be just and proper.

David A. Fall
Proctor for Libelant

2. ORDER FOR DECREE

[Title of Court and Cause omitted; endorsed, filed June 12,1951]

This suit having been tried and submitted for decision; and it appearing to the court:

(a) that libelant brought this action pursuant to the Public Vessels Act (46 U.S.C. §§ 781, *et seq.*) to recover damages arising from personal injury, founding his claims upon asserted tort and contract (see *American Stevedores* v. *Porello,* 330 U.S. 446, 454 (1947); *Cortes* v. *Baltimore Insular Line,* 287 U.S. 367, 371 (1932); and see *Jentry* v. *United States,* 73 F. Supp. 899 (D.C.Cal. 1947));

(b) that following libelant's injury (see 5 U.S.C. § 790) he applied for and received compensation under the Federal Employees Compensation Act (5 U.S.C. §§ 751 et seq.); and

(c) that acceptance of such compensation bars any other remedy libelant may have against the United States "for the same injury" (*Dahn* v. *Davis,* 258 U.S. 421, 432 (1922); *Gibbs* v. *United States,* 1951 Am. Mar. Cas. 119, 125 (N.D.Cal. 1950));

IT IS NOW ORDERED that final decree be rendered for respondent.

IT IS FURTHER ORDERED that proctors for respondent submit findings of fact and conclusions of law and decree accordingly (Fed. R. Adm. 46½) pursuant to local rule 7 within ten days.

IT IS FURTHER ORDERED that the Clerk this day serve copies of this order by United States mail on the proctors for the parties to this suit.

June 12, 1951

WM. C. MATHES
United States District Judge

3. FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Title of Court and Cause omitted; endorsed, filed June 22, 1951]

The above cause having come on the 26th day of February, 1951, the parties appearing by their respective proctors at said trial, oral and documentary evidence having been introduced by and on behalf of the parties, and the matter having been argued and submitted and the Court being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I

That on May 27, 1944 libelant executed a written contract with respondent for employment in the Army Transport Service for a period of one year as a Junior Marine Officer (Engine), commencing May 27, 1944; that thereafter, on March 14, 1945, a new contract was entered into between libelant and the United States of America by and through Army Transport Service for duration of the war plus six months.

II

That said agreements provided, among other things, as follows:

> "The Employee shall be subject to such benefits as he may be entitled to under the United States Employees' Compensation Act of September 7, 1916, as amended, for injury sustained while in the performance of his duty."

III

That in accordance with the orders and assignments as an employee of the respondent the libelant was a member of the crew of the FS 292, which commenced a voyage at Los Angeles Port of Embarkation, Wilmington, California, on the 5th day of July, 1945. Said voyage was to the Islands of the South Pacific and terminated on or about the 26th day of May, 1946, at Apra Harbor, Guam. That on or about the 26th day of May, 1946, libelant was assigned as First Assistant Engineer on the FS 411 at Apra Harbor, Guam, and continued to serve thereon until the 8th day of July, 1947. That during said voyage, on or about the 11th day of June, 1946, libelant was promoted to Chief Engineer and remained as such until the termination of said voyage.

IV

That prior to the institution of this suit libelant executed and filed with respondent a claim under the Federal Employees' Compensation Act for compensation benefits and payments, on account of having become ill with tuberculosis during the term of his employment under said contracts.

V

That following the execution and filing of said claim for compensation under the Federal Employees' Compensation Act, as aforesaid, libelant received and accepted compensation payments for said illness from the United States Employees' Compensation Commission subsequent to the institution of this suit.

VI

That libelant applied for, received and accepted compensation payments voluntarily, without coercion, duress, misrepresentation or undue influence of any nature

whatsoever, and with full knowledge and awareness that he was applying for and receiving from respondent payments on account of compensation for his illness, under the Compensation Act.

CONCLUSIONS OF LAW

I

That this Court has jurisdiction of the parties and the subject matter of this suit under the Public Vessels Act, 46 U.S.C. 781, et seq.

II

That libelant, in accepting compensation provided under the Federal Employees' Compensation Act, made his election to accept compensation under said Act.

III

That libelant, by acceptance of compensation under the Federal Employees' Compensation Act, made an election which bars and estops him from recovery in this action under the Public Vessels Act.

IV

That respondent is entitled to a decree dismissing the libel with costs in respondent's favor.

Let a decree and judgment be entered accordingly.

DATED: June 22, 1951

WM. C. MATHES
United States District Judge

4. EMPLOYMENT CONTRACT

[Endorsed, Libelant's Exhibit 3]

This CONTRACT, executed and entered into this *27* day of *May, 1944,* effective the *27* day of *May, 1944,* between the UNITED STATES OF AMERICA (herein called the "Government"), represented by the Contracting Officer executing this agreement and *Jesse McDonald Allen* applicant, of *2075 Euclid Ave., Long Beach, Cal.* (herein called the "Employee"), WITNESSETH:

1. The Employee, on his representation that he is an experienced and qualified *Jr. Marine Officer (Engine),* and is willing and desirous of enrolling in the Transportation Corps as a marine employee, is hereby employed and agrees to serve on a vessel owned, operated, chartered, employed or controlled by the War Department at any post of duty in the world to which he may be assigned, to be determined by the Government, for a period of one year from the effective date of this contract. From the effective date of this contract, the employee agrees to serve at the minimum rate of *$2200* Dollars per annum. The Employee shall be paid in addition thereto such increases in wages as he may be entitled to by the Maritime War Emergency Board Decisions relating to war bonuses and prevailing practice of the maritime industry as may be adopted by the War Department from time to time under its policy of conforming with the prevailing practice. Payment of the base wages will commence upon the effective date of this contract and payment of the aforementioned increase in wages will be paid as may be prescribed by competent authority to conform with the prevailing maritime practice.

* * * * * * * *

6. The Employee shall be subject to the benefits of the Civil Service Retirement Act of 1930, as amended, and the basic wages in amount specified above will be subject to a deduction of five percent (5%) for retirement pay in accord with existing law.

7. The Employee shall be furnished medical and surgical care at the expense of the Government for illness or injury sustained while in line of duty not resulting from the Employee's own misconduct or delinquency. In the event of illness or injury occasioned by his employment but not due to the Employee's misconduct, the base wages of the Employee will continue during the period of such incapacity. Any such payments made shall be deemed payments on account of or in full, as the case may be, of any other compensation for sick leave to which the Employee might be entitled on account of such injury or illness. The Government will furnish, or otherwise provide without cost to the Employee, such medical treatment and hospitalization including subsistence as is necessary for the proper treatment of any such injury suffered or illness contracted while working for the Government; provided, such medical treatment or hospitalization will not be continued if the disability resulting from such injury or illness, in the judgment of a duly appointed medical officer of the United States Army or such other physician as may be designated by the Government, cannot be materially improved by further treatment or hospitalization; and, in this event, the Government may terminate this contract in writing. Upon such termination, the Employee will be returned, at the expense of the Government, to the most convenient port in the United States, to be determined by the Government and at the option of the Employee to the port of his original departure from the United States.

8. The Employee shall be subject to such benefits as

he may be entitled to under the United States Employees' Compensation Act of September 7, 1916, as amended, for injury sustained while in the performance of his duty.

* * * * * * * *

13. In the event that the Employee is unable to meet to the satisfaction of the Government its standards and requirements for employment for the position in the within contract, the Government may cancel this contract and his employment, upon notice in writing to the Employee in which event, the Employee shall have no further rights under this contract or claim against the Government whatsoever, except, that, if at the time of termination the Employee be at his post of duty outside the continental limits of the United States, the Employee shall be returned at the expense and convenience of the Government to the nearest continental United States port and continue his base wages hereunder until such arrival.

14. In the event conditions in the area to which the Employee is assigned change either by reason of termination of hostilities between the United States and the enemy or by any other reasons to be determined by the Government as not warranting the continued employment of the Employee under this contract, the Government shall terminate this contract by notice in writing and the Employee shall be returned to the port of hire in the United States at the expense and convenience of the Government and be paid his base wages until his arrival at such port in the United States and the Employee shall have no further rights under this contract or claim against the Government whatsoever.

15. The provisions herein contained shall be deemed to include and be the equivalent of the prevailing employment conditions in the maritime industry.

* * * * * * * *

17. The period of service covered by this contract may be extended from year to year or any part thereof upon agreement of both parties in writing prior to the completion of the one (1) year period of service under this contract, or any succeeding renewed one (1) year period or any part thereof, in which case all the conditions applying to the contract during the first year will in like manner apply to each such renewed year. In the event the Employee's designation and/or rate of pay set forth herein be changed by mutual consent of the Government and the Employee, all other provisions of this contract herein contained shall remain valid and shall be applicable to such change of designation and/or rate of pay.

18. The Employee further agrees by the act of enrollment in the Transportation Corps as a marine employee, as evidenced by the within contract, to abide by the rules, regulations, customs and discipline of the service and to obey the lawful orders of his superior officers and all persons in authority pursuant to the customs of the service and to be governed by them during such enrollment. In the event the Employee breaches the rules, regulations, customs and discipline of the service, the provisions of paragraph 12 of the within contract will be invoked and the Employee shall have no further rights under this contract or claim against the Government whatsoever.

19. In case of injury or illness, the Government will notify (Name) *Mrs. Claude S. Allen,* (Relation) *Mother* (Street address) *2075 Euclid Ave.,* (City) *Long Beach,* (State) *Cal.*

20. Subscribed at (City) *St. Petersburg,* (State) *Fla.,* place of hire, this *27* day of *May, 1944.*

(Signature) *Jesse McDonald Allen*

21. The services of (Name in full) *JESSE MC DONALD ALLEN* as (position) *Jr. Marine Officer (Engine)* from date and under conditions herein above stated are accepted.

[s] *Robert G. Fanelli*
ROBERT G. FANELLI
Capt. T.C.
Army Representative Transportation Corps
Marine Officer Cadet School

5. AGREEMENT OF ENROLLMENT

[Endorsed Libelant's Exhibit 4]

CERTIFICATE OF ENROLLMENT
MARINE SERVICE OF THE TRANSPORTATION CORPS
AGREEMENT

State of *Louisiana*
City or Town *New Orleans* } ss:

I, *Jesse M. Allen,* a citizen of the United States, do hereby voluntarily enroll this *14th* day of *March 1945,* as a Transportation Corps civilian marine employee of the War Department at any assigned post of duty in the world to be determined by the Government for a period of *Duration of War plus Six Months,* in accord with the conditions prescribed by law and regulations pertinent to such service, unless sooner released by proper authority and do also agree to accept from the United States such pay, rations and allowances, as may be prescribed or established by law or regulation, including items of uniform and clothing issued incident to my formal training, and do also agree to abide by the rules, regulations, customs and discipline of the service as may be now or hereafter established and to obey the lawful orders of my superior officers and all persons in authority pursuant to the customs of the service and to

be governed by them. I understand that employees of the War Department, serving with the Armies of the United States, in time of war are subject to the Articles of War, and in time of peace are subject to the Articles of War only when serving outside the continental limits of the United States. I understand that this constitutes an agreement of enrollment supplemental to my appointment as an employee of the Government under Civil Service Rules, Schedule A-IV-3 thereof, and that I am entitled to pertinent Civil Service rights, privileges and benefits thereunder, including special benefits applicable to marine employees of the War Department as may be pertinent thereto in accord with law and regulations.

1. I agree if the Government should at any time determine that I have breached the rules, regulations, customs and discipline of the service or that I have refused, neglected or failed to prosecute assigned duties to the satisfaction of the Government or its authorized officers or agents or be unable to prosecute assigned duties by reason of illness due to misconduct, unauthorized absence or other insubordination or misconduct, or I am unable to meet to the satisfaction of the Government or its authorized officers the standards and requirements for employment, or in the event conditions in the area in which I may be employed change either by reason of termination of hostilities, or for any other reasons to be determined solely by the Government as not warranting my continued employment or if the Government should exercise its right to relieve me prior to the conclusion of this term of enrollment for whatever reason, I may be disenrolled and my employment terminated at the pleasure of the Government and under such circumstances I shall have no further right or claim against the Government whatsoever, except as

may be provided by law or regulations now or hereafter to be established.

2. I agree that if I breach this agreement of enrollment prior to the completion of the period agreed on herein that I may be required to reimburse the Government for the reasonable value to it for any expense incurred in connection with formal training made available to me by the Government up to the date of such breach, and I also agree that in the event I breach this agreement of enrollment, to reimburse the Government for the reasonable cost of any travel which may have been performed by me at Government expense to my first duty station after enrollment. Under such circumstances if the Government has previously taken any action towards acquiring for me a special status under the Selective Service and Training Act by virtue of my employment with the Government I understand that the Government may notify the appropriate Selective Service Board of my breach of contract.

3. I understand that the policy of the Government is to follow so far as may be practicable the prevailing practice of the maritime industry with respect to employment on its vessels. I agree as a condition of this enrollment to accept the Government's sole determination of the degree to which the Government adheres to the prevailing practice, as may be set forth now or hereafter in the rules and regulations promulgated by the Government with respect to employment on its vessels.

[s] *Jesse M. Allen*
Signature of Enrollee

On this *14th* day of *March* before me appeared *Jesse M. Allen,* who, in my presence, subscribed the foregoing

certificate of enrollment, and duly acknowledged to me that he had so subscribed same as his voluntary act.

[s] *Minturn M. Snider*
MINTURN M. SNIDER,
1st Lieutenant, TC
Summary Court

* * * * * * * *

Accepted for the Government this *14th* day of *March 1945.*

[s] *Minturn M. Snider*
(Signature of Enrolling Officer)
MINTURN M. SNIDER
1st Lieutenant, TC
Asst. Industrial Personnel Officer

NEW ORLEANS PORT OF EMBARKATION

6. AMENDED COMPENSATION AWARD

[Title of Bureau and Cause Omitted: Part of Respondent's Exhibit A]

Compensation Order having been filed herein on July 18, 1949, which rejected claim of the above named for compensation benefits because the disability for which claim was made was not the result of an injury in the performance of duty and was not proximately caused by the employment, and application for review having been filed by the claimant for modification of such decision, and upon consideration thereof, the Bureau makes the following

AMENDED FINDINGS OF FACT

That after the further consideration of this claim the previous action taken on July 18, 1949, is hereby re-

scinded, and the bilateral pulmonary tuberculosis from which this employee was found to be suffering on August 14, 1947, is found to have been proximately caused by the conditions of his employment as Chief Engineer for the Department of the Army, San Francisco Port of Embarkation.

That the claimant above named is found to be entitled to benefits of the Federal Employees' Compensation Act for the bilateral pulmonary tuberculosis, at the rates specified below, provided he executes and delivers the election specified herein:

Claimant's Rate of Pay	*Per Cent of Monthly Pay*	*Compensation Rate*
$6,457.00 per annum plus subsistence and quarters of $540.00 per annum or $6,997.00 per year	Total maximum from October 13, 1947, to October 31, 1949	$116.66 per month
	November 1, 1949, to April 30, 1950, at two-thirds	$89.71 per week

That the claimant above named, having previously filed a libel in admiralty in the United States District Court, Southern District of California, Central Division, against the United States of America, shall be required to elect whether he intends to pursue his libel filed in the United States District Court or to receive benefits under the Federal Employees' Compensation Act.

Upon the foregoing facts it is ORDERED that there shall be paid from the Employees' Compensation Fund the following benefits: accrued compensation October 13, 1947, to October 31, 1949, at $116.66 per month, $2,869.84, and at $89.71 per week from November 1,

1949, to April 30, 1950, $2,319.56, or a total sum of $5,189.40.

Monthly compensation shall thereafter be paid during the continuance of total disability at the rate of $89.71 per week.

That before compensation is paid under this award the claimant shall be required to execute and return the attached election to receive benefits under the Federal Employees' Compensation Act in place of any benefits under any other Act of Congress, including the Public Vessels Act, Suits in Admiralty Act and the Federal Tort Claims Act.

Given under my hand at Washington, D. C. this 26 day of May 1950.

WM. MCCAULEY
Director

cc: Hon. Clyde Doyle
House of Representatives
Washington, D. C.

Commanding General
San Francisco Port of Embarkation
Fort Mason, California

Mr. H. G. Morison (re: HGM:LC 61-12-29)
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Mr. Jesse M. Allen
1344 Stanley Avenue
Long Beach, California

Mr. David A. Fall
Attorney at Law
1008 South Pacific Avenue
San Pedro, California

7. BUREAU LETTER REGARDING ELECTION

[Part of Respondent's Exhibit A]

U. S. DEPARTMENT OF LABOR
Bureau of Employees' Compensation
Washington 25, D. C.

In reply refer to File No. X-400991
May 31, 1950

Mr. Jesse M. Allen
1344 Stanley Avenue
Long Beach 4, California

Dear Mr. Allen:

There is herewith enclosed for your information copy of Compensation Order modifying the prior decision in connection with your claim for tuberculosis which you claim to have contracted prior to August 14, 1947, while employed as Chief Engineer by the Department of the Army, San Francisco Port of Embarkation.

If you will sign and return the enclosed election the compensation benefits in your case will be paid in accordance with the attached Compensation Order.

It is also suggested if you desire compensation payments that you complete and return the enclosed Form CA-8 to cover the entire period during which you have been disabled and lost pay since July 26, 1948. Your claim Form CA-4 is dated July 26, 1948, and you should bring your claim up to date by completing the first certificate on Form CA-8 to cover the period since July 26, 1948, and have your attending physician complete the medical certificate on the reverse side of Form CA-8. The Form CA-8 should then be returned to this Bureau.

In addition, if you have any dependents within the classes specified on the reverse side of the enclosed Form CA-4a you should complete and return the Form CA-4a in order that you may collect augmented compensation for any dependent which you may have. The aug-

mented compensation will only be payable for periods accruing on and after November 1, 1949, in accordance with the provisions of Public Law 357, 81st Congress.

When returning the election or in replying, kindly address the envelope for the personal attention of Daniel M. Goodacre, Chief Claim Examiner, Bureau of Employees' Compensation, Department of Labor, Washington 25, D. C., and mark on the envelope in the lower left hand corner: PERSONAL ATTENTION—DO NOT OPEN IN MAIL ROOM.

A copy of this letter is being mailed your attorney, Mr. David A. Fall, as well as the Commanding General, San Francisco Port of Embarkation.

Very truly yours,
[s] DANIEL M. GOODACRE
Chief Claim Examiner

Enclosures

cc: Mr. David A. Fall, Attorney at Law, 1008 South Pacific Avenue, San Pedro, California
Commanding General, San Francisco Port of Embarkation, Fort Mason, California
Hon. Clyde Doyle, House of Representatives, Washington, D. C.
Mr. H. G. Morison, Assistant Attorney General, Department of Justice, Washington 25, D. C. (re: HGM-LC 61-12-29)

8. ELECTION OF COMPENSATION

[Part of Respondent's Exhibit A]

U. S. DEPARTMENT OF LABOR
Bureau of Employees' Compensation
ELECTION

File No. *X-400991*

I, *Jesse M. Allen*, injured in the performance of duty while employed by (Establishment) *Department of the*

Army, San Francisco Port of Embarkation, Fort Mason, California at (Place) *A.P.O. 264 and A.P.O. 455,* on (Date) *Prior to Aug. 14, 1947,* having filed a claim pursuant to the provisions of the Federal Employees' Compensation Act, as amended (5 U.S.C. 751), on account of such injury, elect, in accordance with Section 7 of said Act to receive benefits if available under said Act, in place of any benefits (other than the proceeds of any insurance policy) under any other Act of Congress, including the Public Vessels Act, Suits in Admiralty Act, and the Federal Tort Claims Act.

[s] *Jesse M. Allen*
(Name)
JESSE M. ALLEN
1344 Stanley Avenue
(Street Address)
Long Beach 4, California
(City and State)

July 21, 1950
(Date)

9. LIBELANT'S LETTER OF OCTOBER 25, 1947

[Part of Respondent's Exhibit A]

Jesse M. Allen
U.S. Marine Hospital
Ft. Stanton, New Mexico
October 25, 1947

Federal Security Agency
Bureau of Employees Compensation
285 Madison Avenue
New York 17, New York

Gentlemen:

I have been employed by the War Department in the field with the Transportation Corp, Army Service Forces from March 25, 1944 through October 9, 1947. On October 9, 1947 I was forwarded my W.D. form C.P. 50 stating in paragraph 5, quote "Resignation" unquote, and in paragraph 13 quote "Reason: Due to ill health. (Medical certificate submitted)." unquote. On August 14, 1947 at the request of the U.S. Public Health Officer at their relief station, Honolulu, T.H. I reported to the officer in charge at the Aiea Naval Hospital, Aiea Heights, T.H. for treatment and cure of pulmonary tuberculosis as diagnosed from a routine XRay and physical examination at their relief station. On August 14, 1947 at the request of the Director of Operation, Water Division, 55th Transportation Medium Port, APO 455, I submitted a letter to the director of operation through the master of my vessel asking for a release from duty aboard the U.S. Army FS 370 as chief engineer and requested to be placed on sick leave and/or annual leave until such time as I was deemed "fit for duty" by the U.S. Public Health officers. My accrued sick leave expired on October 9, 1947 and it is apparent by this W.D. form C.P. 50 that my employment with the War Department is hereby severed. This

was not my wish as can be ascertained by the wording of my letter asking for a release from duty. However if their complement of personnel at the 55th Transportation Medium Port does not permit them to carry me on their staff this is satisfactory with me. However, I am now by the nature of this letter submitting a claim to your office for compensation commensurate with my salary, at the time of my forced resignation October 9, 1947. I am requesting this compensation in view of the extenuating circumstances, namely, I contacted this disease while I was on duty on your vessels in the South Pacific theatre, and that I was exposed to a tropical climate for over two years without a physical checkup by government physicians, and I believe I am entitled to this compensation in view of the fact that I have been paying toward retirement with civil service even though this disease is service connected.

I am trusting to a speedy reply by your office.

I remain respectfully,

[s] JESSE M. ALLEN
Jesse M. Allen, S.S. 496-09-6176
1344 Stanley Avenue
Long Beach, California

10. LIBELANT'S NOTICE OF CLAIM

[Part of Respondent's Exhibit A]

EMPLOYEE'S NOTICE OF INJURY OR OCCUPATIONAL DISEASE

Federal Employees' Compensation Act of September 7, 1916, as amended

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[Text of instructions omitted]

Date of this notice *29 June, 1948*

1. I hereby certify that I was employed as a *Chief Engineer of the U. S. Army F S 370* at the *55th Trans-*

portation Medium Port, APO 455, c/o Postmaster, San Francisco, California and on *Thursday, August 14, 1947,* at *6 p.m.* I was *entered at the Aiea Naval Hospital for treatment of bilateral pulmonary tuberculosis.*

2. Cause of injury—*After being exposed to at least one known case of pulmonary tuberculosis I was sent to the South Pacific Theatre for duty that lasted two years without a physical checkup by a physician and in conditions that were a competent producing cause of tuberculosis.*

3. Nature of injury *Bilateral pulmonary tuberculosis.*

4. Names of witnesses to injury
   Elmer W. Huggler, R D #3, Lewistown, Pennsylvania
   Laurence M. Lambert, 6370 Franklin Ave., Hollywood, California
   Lucius Keller, 1st off., F S 368, APO 455, c/o PM, San Francisco, Calif
   Vsevolod A. Zachary, 1461 Funston Ave., San Francisco, California
   Robert Moore, 1st ass't, F S 400, APO 246, c/o PM, San Francisco, Calif

5. If this notice was not given within 48 hours after the injury, explain reason for delay and state name of person to whom notice was first given, and when. *I first informed Mr. E. M. Donnelly, Director of Operation, 55th Med. Trans. Port, of the findings of the U. S. P. H. S. doctors and showed him my X-rays. Mr. Donnelly then requested me to submit to the master of the U. S. Army F S 370, Mr. John Ulman, a letter stating my condition with a request for release for hospitalization. I submitted this letter to Mr. John Ulman on August 14, 1947.*

This injury was not caused by my willful misconduct, intention to bring about the injury or death of myself or of another, nor by my intoxication, and I hereby make claim for compensation and medical treatment to which I may be entitled by reason of the injury sustained by me.

Name *Jesse M. Allen*
Address *U. S. Marine Hospital*
Fort Stanton, New Mexico

C. A. 1
Revised August 1, 1945

11. AFFIDAVIT OF LIBELANT

[Title of Court and Cause Omitted]

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss:

JESSE M. ALLEN, being first duly sworn, deposes and says: That he is the libelant in the above entitled action. That he was without funds with which to live upon and support his wife and was forced thereby to take the funds awarded to him under his claim for compensation under the F.E.C.A. for Tuberculosis that he suffered as the result of his employment under the contracts of employment with the United States Army Transport Service. That libelant has been unable to work since he was taken to the hospital suffering from what later was discovered to be Tuberculosis, in the Fall of 1947.

[s] JESSE M. ALLEN

Subscribed and sworn to before me
this 26th day of February 1951.

[s] DAVID A. FALL
Notary Public

32.1. *General.* The basic appointment of seamen, as evidenced by the WD Form 50, will generally be supplemented by an agreement evidencing the maritime rights, privileges and benefits to which seamen are entitled. Such supplemental agreements will be in the form of an Agreement of Enrollment or Individual Contract of Employment or Shipping Articles as may be authorized by the Chief of Transportation. Such supplemental agreements do not constitute the basis of employment of seamen since the basic authority for the employment of seamen is Schedule A-IV-3 of the Civil Service Rules. Seamen employed under an Agreement of Enrollment or an Individual Employment Contract will not be required to sign Shipping Articles in addition thereto. In cases where Individual Employment Contracts or Agreements of Enrollment are utilized, such agreements or contracts will be in lieu of Shipping Articles.

32.2. *Individual Employment Contracts.* Seamen who are appointed for permanent or indefinite duty overseas on vessels operated by the Transportation Corps may be required to execute individual employment contracts. The terms and conditions of such individual employment contracts will govern the conditions of employment. In such cases, the seamen will be assigned to vessels which they may be directed to deliver to their assigned post of duty by port order; copies thereof together with copies of employment contract will be placed aboard such vessels in lieu of shipping articles. One such port order may be utilized for assigning one or more than one seaman to a vessel.

32.3. *Agreements of Enrollment.* In those cases where specifically authorized by the Chief of Transpor-

tation, Agreements of Enrollment will be utilized to enroll seamen for service on vessels operated by the War Department. Where such agreements of enrollment are utilized, seamen will be assigned to vessels by means of a port order; copies thereof together with copies of agreement of enrollment will be placed aboard the vessel in lieu of shipping articles. One such port order may be utilized for one or more than one seaman for assignment purposes.

* * * * * * * *

132.5. *Application of Leave During Illness or Injury.* If a civilian seaman sustains injury or illness, the time that he is physically incapacitated from active duty will be charged to his accumulated sick leave. If the amount of accumulated sick leave is not sufficient to cover the period of his illness or injury, annual leave will be charged against such period of incapacitation. If the combined annual and sick leave accumulated to the credit of the seaman is not sufficient to cover the period of illness, the employee may, nevertheless, continue to receive his basic wage plus maintenance during his period of illness or injury in conformity with prevailing maritime practice. In such cases, the combined accumulated sick and annual leave to the employee's credit will be charged against the equivalent period of time during which the seaman would normally receive payment in accord with the prevailing maritime practices.

132.6. *Computation of Wages.* a. The basic wages will continue payable only until the conclusion of the voyage had the seaman continued to serve upon the vessel or until he returns to the continental limits of the United States, whichever is sooner. The completion of a voyage will be the date of arrival of the vessel at the port of hire. In the event, however, the vessel stops

en route in returning at a continental port of the United States other than the home port of the vessel and is thereafter directed to proceed to a point other than the home port, the date of such direction will be deemed to be the date of the completion of the voyage.

* * * * * * * *

163.2. *Effect of Maintenance and Cure on Sick Leave.* a. Seamen, who, during the course of a voyage, sustain injury or illness, shall be charged sick leave for the period of time that such illness or injury continues. If the illness or injury continues beyond the expiration of his accrued sick leave, he may, in certain cases, be "advanced" sick leave not to exceed an additional 30 days. If the seaman is not eligible for advance sick leave, or if the illness or injury continues beyond such period, the accrued annual leave will be charged against such absence.

b. In any event, if the seaman's illness or injury was not occasioned by his own delinquency or misconduct, he will be entitled to payment of his base wages until the conclusion of the voyage, had he continued to serve upon the vessel, or until he returns to the continental limits of the United States, whichever is sooner, in conformity with prevailing maritime practice. In such cases, however, all his accrued sick and annual leave will be charged against the payment of basic wages during his illness or injury.